

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

Implementation of the Pay Telephone)	
Reclassification and Compensation Provisions)	
Of the Telecommunications Act of 1996)	
)	CC Docket No. 96-128
Petition of the Florida Public Telecommunications)	DA 06-310
Association, Inc. for a Declaratory Ruling and for)	
An Order of Preemption Concerning the Refund of)	
Payphone Line Rate Charges)	

**REPLY COMMENTS OF THE
INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.**

On February 8, 2006, the Commission released a *Public Notice* in the above-captioned proceeding¹ requesting comment on the Petition filed by the Florida Public Telecommunications Association, Inc. (“FPTA”) regarding payphone access line charges collected by BellSouth Telecommunications, Inc. from payphone service providers (“PSPs”).² The Independent Payphone Association of New York, Inc. (“IPANY”) respectfully submits these Reply Comments in support of FPTA’s Petition.

¹ *Pleading Cycle Established for Florida Public Telecommunications Association, Inc. Petition for Declaratory Ruling and Order of Preemption*, CC Docket No. 96-128, Public Notice, DA 06-310 (Released February 8, 2006).

² *Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption*, CC Docket No. 96-128, submitted January 31, 2006. (“FPTA Petition”)

STATEMENT OF INTEREST

IPANY is the trade association representing independent owners and operators of public pay telephones throughout New York State. For over nine years, IPANY and its individual members have been vigorously prosecuting proceedings on the state and federal levels to obtain payphone rates that comply with the New Services Test (“NST”), and to obtain refunds for the unlawful overcharges imposed on payphone owners since April 1997. As the Commission is aware, IPANY has its own Petition pending before this Commission which requests the preemption of determinations made in New York State that are at odds with this Commission’s directives.³ The interests of IPANY’s members are similar to those of FPTA’s members, and IPANY joins FPTA in requesting that this Commission make clear federal law, as applied by this Commission, is paramount.⁴

BACKGROUND

In its Petition, FPTA showed that BellSouth violated §276 of the Telecommunications Act of 1996⁵ by collecting End User Common Line or Subscriber Line Charges (“EUCL/SLC”) in addition to already fully-compensatory payphone access

³ *Petition of the Independent Payphone Association of New York, Inc. for an Order of Preemption and Declaratory Ruling*, CC Docket No. 96-128, submitted December 29, 2004.

⁴ The nature of the state proceedings, and the timing of the administrative challenge and judicial review, differ between the New York and Florida litigation. However, the underlying legal principle is the same: The RBOCs which received Dial Around Compensation in return for the promise to pay refunds must be held to their commitment.

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), at §276.

line charges -- a violation of the NST⁶ -- after clear direction was provided by the FCC.⁷ Accordingly, FPTA requested that BellSouth be required to refund to PSPs an amount equivalent to what those providers paid BellSouth in excess of the proper NST rate from April 15, 1997 (the effective date of the *1997 Payphone Refund Order*) to November 10, 2003 (the date BellSouth's Florida tariff was made compliant with the NST) -- with interest -- because the charges improperly included EUCL/SLC amounts. FPTA also requested that the FCC preempt the Florida Public Service Commission ("FPSC") ruling refusing to grant refunds, on the ground it is inconsistent with this Commission's regulations and orders.

ARGUMENTS MADE BY BELL SOUTH

In the Initial Comments filed jointly by AT&T, BellSouth, and Verizon ("BellSouth"),⁸ four categories of concern were raised to refute the claims of FPTA:

- (1) *Res Judicata* -- According to BellSouth, FPTA's arguments were rejected by the FPSC; the FPSC's actions were not timely appealed by FPTA; and the Florida

⁶ *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, FCC 96-388, September 20, 1996, 11 FCC Rcd. 20541, ¶¶ 146-147 ("First Payphone Order"), and Order on Reconsideration, November 8, 1996, 11 FCC Rcd. 21233 ¶¶ 131, 163 ("Payphone Reconsideration Order") *aff'd in part and remanded in part sub. nom. Illinois Public Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("Bureau Waiver Order"); Order DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("Bureau Clarification Order," also referred to as the "1997 Payphone Refund Order") (collectively the "Payphone Orders").

⁷ *1997 Payphone Refund Order*, at ¶ 25.

⁸ *Comments of AT&T, Inc., BellSouth Telecommunications, Inc., and the Verizon Telephone Companies on Florida Public Telecommunications Association's Petition for a Declaratory Ruling*, CC Docket No. 96-128 (Submitted February 28, 2006).

Supreme Court dismissed the appeal of the FPSC's decision. As a result, the FCC's consideration of the issues have been barred by *Res Judicata*.

- (2) State Jurisdiction -- According to BellSouth, the FCC left payphone rate tariffing to the states. States have primary jurisdiction if they decide to carry out this role (which Florida did) and, as a result, the rates in question cannot be changed under the Filed Rate Doctrine.
- (3) Administrative Law -- According to BellSouth, FPTA's claim was barred under Florida law because it requested the FPSC to overturn a final administrative order and grant a retroactive refund. Similar in concept to the Filed Rate Doctrine argument, BellSouth asserts that once a state's administrative processes have been exhausted, refunds cannot be made on an approved tariff rate.
- (4) Standing -- Finally, according to BellSouth, FPTA is not the appropriate party to raise these issues because it was not the entity that paid per-call compensation to BellSouth. Only the individual PSPs would have standing to prosecute these claims.

RESPONSES TO ARGUMENTS MADE BY BELL SOUTH

There is no dispute that the FPSC issued orders in this case rejecting FPTA's arguments regarding the proper rates under the NST. However, §276(c) of the Telecom Act clearly states that "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."⁹ The FPSC's decisions in this case did not follow the dictates of the applicable Commission orders, including the Commission *Wisconsin Order of*

⁹ 47 USC §276(c).

January 31, 2002, and the *1997 Bureau Refund Order*, because the FPSC declared BellSouth's rate compliant with the NST, even though the EUCL/SLC was not removed as a rate element until November 10, 2003. As a result, under this Commission's orders, refunds must be given for the period April 15, 1997, through and including November 10, 2003 (with interest). The Florida PSC's contrary determination must be preempted.

BellSouth's commitment - and obligation - to make refunds was codified in the *1997 Bureau Refund Order*, which held:

The requirements for intrastate tariffs are (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines; and (2) that the states ensure that payphone costs for unregulated equipment and subsidies be removed from the intrastate local exchange service and exchange access service rates.¹⁰

The *Bureau Refund Order* went on to state that effective intrastate payphone service tariffs must comply with the NST in order for a LEC to be eligible to receive Dial Around compensation.¹¹ To be compliant with the NST, any EUCL/SLC charge had to be removed from the rate as of April 15, 1997.¹² BellSouth did not make the required tariff change, although it knew full well that's what the NST required. Accordingly, BellSouth has no one but itself to blame because it then became obligated to pay refunds.

The *1997 Bureau Refund Order* preempted any claim by BellSouth that refunds could not be made under the Filed Rate Doctrine. To begin with, the Filed Rate Doctrine is a state requirement, but the duty of a Regional Bell Operating Company ("RBOC") to

¹⁰ *1997 Bureau Refund Order*, at ¶ 10.

¹¹ *Id.*, at ¶ 18.

¹² *See: e.g., In the Matter of Wisconsin Public Service Commission Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, January 31, 2002, at ¶ 60. ("*Wisconsin Order*")

give a refund in this situation arises under federal law, not state law.¹³ Federal law, as set forth in this Commission's orders, must supercede state law.

It is federal law, as set forth in the RBOC commitment letters and the *1997 Bureau Refund Order*, which require BellSouth to give refunds back to April 15, 1997. That *Order* was a binding regulatory order which governed the validity of BellSouth's payphone rates as of April 15, 1997, and created the refund obligation on a prospective basis as of that date. From that point on, the lawfulness of BellSouth's rates was conditioned on the subsequent finding of compliance with the NST, and had the same effect -- and validity -- of an accounting order issued by this Commission.

Further, all of the RBOCs -- including BellSouth -- specifically waived any claim that the Filed Rate Doctrine might apply in the RBOC Coalition Letter of April 10, 1997, which stated in pertinent part:

I should note that the Filed-Rate Doctrine precludes either the state or federal government from ordering such retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.¹⁴

Therefore, even if the Filed Rate Doctrine would, as a matter of federal law (or even state law) have precluded refunds (which would not have been the case), any claim to that effect was unequivocally waived by the RBOCs back in 1997.

While BellSouth did eventually amend its rates so that they became compliant with the NST, such actions should not absolve the company from charging incorrect rates between 1997 and the date they were properly filed in November 2003.

¹³ *See: e.g., 1997 Bureau Refund Order.*

¹⁴ *See: Letter from Michael K. Kellogg, RBOC Payphone Coalition, to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, FCC, dated April 10, 1997, at p. 2.*

While it is true the Commission's *Wisconsin Order* is silent on refunds, that does not mean that refunds are not due in this case. The issue of refunds was never before the Commission at that time, and therefore, there was no reason to discuss the subject in the *Wisconsin Order*. Indeed, since the issue of refunds had been dealt with (and mandated) by the Commission in its April, 1997 Orders, no further statements were necessary in the *Wisconsin Order*.

Finally, BellSouth makes the spurious claim that because the association is not the entity which paid BellSouth that it lacks standing to seek a refund on behalf of its members. To the contrary: it is well established law that an association has standing to represent its members in a given proceeding where its members themselves would have standing.¹⁵

The only question today before this Commission is whether it will require that its *Bureau Refund Order* be enforced against BellSouth and other RBOCs, or whether the RBOCs will be allowed to escape their obligations to make PSPs whole from years of being overcharged.

¹⁵ Hunt v. Washington State Apple Advertising Commission, 97 S. Ct. 2434, 432 US 333.

CONCLUSION

This Commission should apply the straightforward dictates of §276 of the Telecommunications Act and the *1997 Bureau Refund Order* and require that BellSouth and any other RBOC that failed to establish NST compliant rates reimburse PSPs from April 1997 to the date of compliance, with interest. Such a result comports with the Commission's directives and preserves the integrity of this Commission's regulatory authority.

Respectfully Submitted,

INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.

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Dated: March 10, 2006
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Certificate of Service

The undersigned, as Counsel for the Independent Payphone Association of New York, Inc. hereby certifies that on March 10, 2006, a true and correct copy of the foregoing Reply Comments of the Independent Payphone Association of New York, Inc. on the Petition of the Florida Public Communications Association, Inc. was served in the manner indicated on the following:

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